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# OCCUPATIONAL RISK: THE OUTRAGEOUS REACTION TO HIV POSITIVE PUBLIC SAFETY AND HEALTH CARE EMPLOYEES IN THE WORKPLACE

MANJU GUPTA<sup>1</sup>

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<sup>1</sup>J.D. Cleveland Marshall College of Law, 2003; M.B.A. Cleveland State University, 2003; B.S. John Carroll University, 1999. The author would like to thank Gordon Beggs, Esq. for his guidance and knowledge.

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## I. INTRODUCTION

In 2000, Stephen Derrig, an Akron firefighter, went to a number of doctors seeking a diagnosis for his breathlessness and fatigue.<sup>2</sup> Laying in a hospital bed he was told that he had tested positive for HIV, which had progressed to AIDS.<sup>3</sup> Derrig is a heterosexual man who is married.<sup>4</sup> Luckily, neither his wife nor his children has been diagnosed with the virus.<sup>5</sup> He is not an intravenous drug user.<sup>6</sup> He contracted the disease while at his job, as a fire fighter.<sup>7</sup> It is not known by whom he was infected.<sup>8</sup> As a firefighter he has assisted countless people.<sup>9</sup> He does not know in which encounter he contracted the infection.<sup>10</sup> He assumes he became infected on the job because he does not engage in any of the behaviors that are typically associated with HIV transmission.<sup>11</sup>

He went public with his case in order to shatter the misperceptions surrounding AIDS.<sup>12</sup> He believes that an infected public safety employee should continue to work in his or her position.<sup>13</sup> One of the differences from Derrig's time of infection to today is awareness. The medical profession and governmental agencies have publicly stated the employees in fields where transmission is a possibility should be able to continue in their positions as long as universal precautions are utilized.

Physicians have offered their support to Derrig.<sup>14</sup> Derrig is back to work staffing the fire truck.<sup>15</sup> He is not serving in his former position as a firefighter. Contrary to

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<sup>2</sup>Julie Wallace, *Akron Man Wins Workers' Compensation for Disease He Knows He Contracted on the Job*, AKRON BEACON JOURNAL, Oct. 13, 2002, at A1.

<sup>3</sup>*Id.*

<sup>4</sup>*Id.*

<sup>5</sup>*Id.*

<sup>6</sup>*Id.*

<sup>7</sup>Julie Wallace, *supra* note 2, at 2.

<sup>8</sup>*Id.*

<sup>9</sup>*Id.*

<sup>10</sup>*Id.* at 3.

<sup>11</sup>Wallace, *supra* note 2, at 3.

<sup>12</sup>*Id.*

<sup>13</sup>*Id.*

<sup>14</sup>*Id.*

<sup>15</sup>Wallace, *supra* note 2, at 4.

popular belief the position transfer is not due to the fire department being fearful of transmission, but that Derrig would be compromising the fragility of his immune system.<sup>16</sup>

Dr. Trish Perl, M.D., at John Hopkins Hospital and Health System in Baltimore, oversees a committee that devises work plans for employees who have contagious diseases.<sup>17</sup> She claims, “[All] too often people want to spirit away the worker out of fear he or she will spread the disease.”<sup>18</sup> She argues that with simple precautions it is not necessary for an employee to quit.<sup>19</sup> The precautions will provide enough protection to contain the disease. She points out that neither Derrig’s wife nor children have the disease, which verifies that the disease is not easily transmittable.<sup>20</sup>

Society, including the legal profession, fears the risk of transmission of HIV in an occupational setting. This is particularly true for those in the health care and public safety settings (fire fighters, police, and healthcare practitioners). This note will assert that the law should afford HIV infected public safety and healthcare employees the right to continue in their occupations. According to current medical evidence, when public safety and healthcare employees use universal precautions the risk of transmission to a person(s) assisted is insignificant.

At the beginning of the epidemic, the medical profession had yet to conduct research, and the risks of HIV/AIDS were largely unknown. Under those circumstances, it is understandable that the courts may have been overly cautious when confronted with cases involving HIV/AIDS. However, twenty years after the epidemic surfaced, the medical evidence should calm irrational fears that have plagued society. The misguided fear arises because the job duties of public safety and healthcare personnel may include direct contact with bodily fluids.

Currently, the great majority of courts have ruled that HIV infected employees should not continue in these occupations. Viewed in the light of available medical evidence and statistical data, these rulings represent an overreaction caused by fear surrounding the epidemic. These courts have not measured actual risk against the statutory standards required by the Rehabilitation Act of 1973<sup>21</sup> and the Americans with Disability Act (ADA).<sup>22</sup> In these cases, the courts have held that when there is any conceivable risk, no matter how theoretical, the employee must discontinue his present work. Only a few courts have carefully assessed the medical evidence and followed statutory guidelines, which permit employees to continue in their occupations because the risk that HIV public safety and healthcare employees pose to the public is infinitesimal.

This note will critically analyze decisions that do not support public safety and health care employees continuing in their professions. The note opens first with an examination of the history of AIDS and recent treatment of the disease. The second

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<sup>16</sup>*Id.*

<sup>17</sup>*Id.*

<sup>18</sup>*Id.*

<sup>19</sup>Julie Wallace, *supra* note 2, at 5.

<sup>20</sup>*Id.*

<sup>21</sup>29 U.S.C. § 794 (1973).

<sup>22</sup>42 U.S.C. § 12101 *et seq.*

and third sections discuss the statutes and two leading case decisions that involve the treatment of AIDS. The fourth section will analyze the cases that do not support employment of HIV persons in the public safety and healthcare fields. The fifth section discusses cases that favorably treat HIV persons allowing them to continue in their positions in the public safety and healthcare fields. Finally, in the sixth section the note will conclude with what one may draw from the present medical evidence and statistics and how the present treatment of HIV is similar to the past treatment of persons thought to present a threat of communism.

## II. HISTORY AND COMMUNICABILITY OF THE DISEASE

### A. History

AIDS first emerged in the mid-1970s in Central Africa.<sup>23</sup> One of the first known persons to be infected with the Acquired Immune Deficiency Syndrome (AIDS) was a surgeon working in Zaire.<sup>24</sup> In the 1980's similar symptoms appeared in New York City's gay community.<sup>25</sup> It was a disease that seemed to primarily affect one's immune system.<sup>26</sup> The Center for Disease Control (CDC), the leading federal agency for protecting the health and safety of people, was unsure how to handle, prevent, and minimize the impact of the disease.<sup>27</sup>

In 1981, a French-Canadian flight attendant, known as Gaetan Dugas, was treated in New York City for a skin condition identified as Kaposi's Sarcoma.<sup>28</sup> The condition is an ailment of AIDS. Through Dugas' sexual partners, medical researchers gained knowledge that the disease was transmitted through sexual contact.<sup>29</sup> By the mid-1980's, the disease was prevalent in gay communities across America.<sup>30</sup>

Two decades ago AIDS was known primarily as a disease that infected gay men.<sup>31</sup> A recent CDC survey showed that more than thirty percent of gay black males ages twenty-three to twenty-nine in six United States cities have HIV.<sup>32</sup>

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<sup>23</sup>MARGARET C. JASPER, *AIDS LAW* 1 (Oceana Publication, Inc., 2000).

<sup>24</sup>*Id.*

<sup>25</sup>*Id.*

<sup>26</sup>*See id.*

<sup>27</sup>Center for Disease Control and Prevention, Nov. 2, 2002, <http://www.cdc.gov/about/cdc.htm> (last visited Mar. 2003).

<sup>28</sup>*See* JASPER, *supra* note 23, at 2.

<sup>29</sup>*See id.*

<sup>30</sup>Susan J. Levy, *The Constitutional Implications of Mandatory testing for Acquired Immunodeficiency Syndrome—AIDS*, 37 Emory LJ 217, footnote 51 citing to Rabin, *The AIDS Epidemic & City Bathhouses: A Constitutional Analysis* 10 J. HEALTH POL. POLY. 729, 743 (1986).

<sup>31</sup>Carol Clark, *Paying the price of AIDS*, <http://archives.cnn.com/SPECIALS/2001/aids/stories/social.cost.html> (last visited Mar. 2003).

<sup>32</sup>Caroline Palmer, Lynn Mickelson, *Many Rivers to Cross: Evolving And Emerging Legal Issues in the Third Decade of the HIV/AIDS Epidemic*, 28 WM. MITCHELL L. REV. 455, 464-465 (2001).

However, today it is a disease that infects people of every age, nationality, and sexuality.<sup>33</sup> Presently, there are approximately 800,000 to 900,000 people living in the United States who are infected with Human Immunodeficiency Virus (HIV).<sup>34</sup> Each year an additional 40,000 people will become infected.<sup>35</sup> Universally, there are approximately forty million people living with HIV around the world.<sup>36</sup>

The disease is communicated through sexual contact, the exchange of bodily fluids, and from mother to child through pregnancy.<sup>37</sup> Having unprotected sex, sharing used needles, and a mother passing the disease to her child through vaginal fluids or breast-feeding are the most common forms of transmission.<sup>38</sup> A person who is infected with the HIV virus may remain healthy and show no physical effects for four to seven years.<sup>39</sup>

Once a person is infected with HIV it is inevitable that the infection will progress to AIDS.<sup>40</sup> The virus invades primarily white cells and body tissues.<sup>41</sup> The virus attaches to the cell and fuses into the cell's membrane.<sup>42</sup> The effect is that the body is unable to fight off infection and the body's immune system is compromised.<sup>43</sup>

Society has reacted to AIDS hysterically, with minimal empathy, logic, or compassion. A case in 1991 illustrates this point.<sup>44</sup> After John Doe was arrested, he disclosed to police officers that he was HIV positive.<sup>45</sup> Later that day, Doe's car rolled down a hill and struck a neighbor's fence.<sup>46</sup> The police told the neighbor that Doe was infected with AIDS.<sup>47</sup> The neighbor was very distraught because Doe's children and the neighbor's children went to school together.<sup>48</sup> The neighbor

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<sup>33</sup>Clark, *supra* note 31.

<sup>34</sup>Clark, *supra* note 31.

<sup>35</sup>Clark, *supra* note 31.

<sup>36</sup>Millions Mark World AIDS Day, (Dec. 1, 2002), <http://www.cnn.com/2002/HEALTH/12/01/aids.day/index.html> (last visited Mar. 26, 2006).

<sup>37</sup>Anonymous Fireman v. City of Willoughby, 779 F. Supp. 402, 407 (N.D. Ohio 1991).

<sup>38</sup>DONALD T. DICKSON, HIV, AIDS, AND THE LAW, LEGAL ISSUES FOR SOCIAL WORK PRACTICE AND POLICY 103-104 (Aldine De Gruyter ed., Hawethorne 2001).

<sup>39</sup>Dr. Steve Salvatore, *Researchers create 3-D Image of How HIV Attacks* June 18, 1998 <http://www.cnn.com/HEALTH/9806/18/aids.virus.02/index.htm> (Mar. 2006).

<sup>40</sup>AIDS.org, <http://www.aids.org/FactSheets/101-what-is-aids.html> (follow "Fact Sheets," follow "What is Aids," follow "Is There a Cure for Aids").

<sup>41</sup>See SALVATORE, *supra* note 39.

<sup>42</sup>*Id.*

<sup>43</sup>See *id.*, *supra* note 37.

<sup>44</sup>Doe v. Borough of Barrington, 729 F. Supp. 376 (D.N.J. 1990).

<sup>45</sup>*Id.* at 379.

<sup>46</sup>*Id.*

<sup>47</sup>*Id.*

<sup>48</sup>*Id.*

contacted other parents and the media.<sup>49</sup> Consequently, the next day nineteen children were removed from the school Doe's children attended.<sup>50</sup> These events occurred because of the irrational fear surrounding the disease.

The disease affects every aspect of a person's life. The stigma attached to HIV/AIDS has horrendous consequences. Society's treatment of the disease causes a person infected with AIDS to have not only emotional, but financial consequences as well, such as the loss of the person's job and health insurance. These are consequences that may lead to poverty. Despite contrary evidence, society is not convinced that HIV cannot be spread through casual contact.<sup>51</sup>

Early on, the government did not address society's fear of the disease.<sup>52</sup> In the crucial years of the 1980's, the administration, led by Ronald Reagan, did little to calm the apprehension and falsities surrounding the disease.<sup>53</sup> Twenty years after AIDS appeared in the United States, the legal profession still struggles with the coming to terms with the disease, just as much as the rest of the population.

### B. Precautions

To prevent the transmission of HIV in occupational settings, leading government agencies such as the CDC, as well as others, recommend the use of universal precautions.

One such government agency is the Federal Occupational Safety and Health Administration (OSHA). They suggest wearing gloves, protective glasses, and masks.<sup>54</sup> It did not make any of these provisions mandatory until 1992.<sup>55</sup> Another, the CDC, identifies some of the same precautions such as the use of gloves, gowns, aprons, masks, or protective eyewear, which can reduce the risk of exposure of the health care worker's skin or mucous membranes to potentially infective materials. In addition, under universal precautions, the CDC recommends that all health care workers take precautions to prevent injuries caused by needles, scalpels, and other sharp instruments or devices.<sup>56</sup>

The following is a partial list of universal precautions that the CDC publishes:

- 1) Employees should wash their hands as soon as feasible following contact with blood or other infectious diseases.<sup>57</sup>

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<sup>49</sup>See *Borough of Barrington*, 729 F. Supp. at 379.

<sup>50</sup>*Id.*

<sup>51</sup>See DICKSON, *supra* note 36, at 4.

<sup>52</sup>Caroline Palmer & Lynn Mickelson, *Many Rivers to Cross: Evolving And Emerging Legal Issues in the Third Decade of the HIV/AIDS Epidemic*, 28 WM. MITCHELL L. REV., 455, 459 (2001) (discussing the changes in laws that affect people with HIV/AIDS throughout the United States).

<sup>53</sup>*Id.*

<sup>54</sup>See WALLACE, *supra* note 2, at 4.

<sup>55</sup>See *id.*

<sup>56</sup>*Universal Precautions for Prevention of Transmission of HIV and Other Bloodborne Infections*, (1987) <http://www.cdc.gov/ncidod/hip/Blood/UNIVERSA.HTM>, (last visited Mar. 2003).

<sup>57</sup>29 C.F.R. § 1910.1030(d)(2)(vi) (2003).

- 2) Contaminated needles and other contaminated sharps shall not be bent or recapped unless the employer can demonstrate that no alternative is feasible.<sup>58</sup>
- 3) Contaminated needles shall be disposed of in puncture resistant containers.<sup>59</sup>
- 4) An employer shall have an exposure control plan in place and update it annually.<sup>60</sup>

When a person follows these precautions there is an extraordinarily small possibility of transmission. In July 1991, the CDC acknowledged that HIV infected healthcare workers generally pose no risk of transmitting HIV if universal precautions are followed.<sup>61</sup> The CDC indirectly asserted that when the workplace adopts a policy of universal precautions, the probability of transmission is virtually eliminated.<sup>62</sup>

### C. Statistics on Occupational Transmission

The crucial question posed to society is if an HIV positive public safety or health care employee endangers the life of a person that they assist. In July 1991, the CDC acknowledged that an HIV infected healthcare worker posed no risk of transmission to a patient if the worker adhered to universal precautions and did not perform invasive procedures.<sup>63</sup> Realistically, it is quite improbable for a healthcare or public safety employee to infect a patient.

Studies have shown that a vast majority of occupational transmissions of HIV occur through needle sticks, where a healthcare or public safety employee administers an injection. Therefore for a healthcare or public safety employee to infect a patient or victim by this means, the worker would first have to stick themselves with a needle and then use the contaminated needle and poke the person assisted. To transmit the infection otherwise would require a similarly extraordinary combination of events such as a worker cutting himself and then bleeding directly into the open wound of the person assisted.

The improbability of occupational transmission to a patient or victim is evidenced by the fact that there are only six reported patients who have contracted HIV from a healthcare worker or a public safety employee since the beginning of the epidemic twenty years ago. Only one healthcare worker, Dr. Acer, a dentist practicing in the state of Florida, infected all six patients. After the state investigated, it was reported that Dr. Acer did not use the recommended universal precautions. In addition, his office had no written policy for sterilizing dental

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<sup>58</sup>29 C.F.R. § 1910.1030(d)(2)(A) (2003).

<sup>59</sup>29 C.F.R. § 1910.1030(d)(2)(viii)(A) (2003).

<sup>60</sup>29 C.F.R. § 1910.1030(1)(C)(iv) (2003).

<sup>61</sup>*Patient Care Delivery Issues*, 1 Health L. Prac. Guide § 10:11 (2002).

<sup>62</sup>Ursula Smith, *Modes of Transmission, Testing for HIV Antibodies, and Occupational Exposure to HIV*, Vol. 98, NURS. TIMES, No. 6, 42 (Feb. 7, 2002).

<sup>63</sup>1 Health L. Prac. Guide § 10:11 (2002).



instruments and equipment.<sup>64</sup> The observer is left with the impression that something extremely untoward and outside the realm of normal medical practice occurred in these six cases.

Many more HIV transmissions have occurred from patient to health care and public safety employee, rather than from health care worker/public safety employee to persons assisted. In the twenty years of the epidemic, there have been ninety-three reported cases of HIV transmissions from a person being assisted to a health care worker or public safety employee.<sup>65</sup> Fifty-six percent of the ninety-three transmissions have been to health care workers. Most occur through contaminated needle stick injuries.<sup>66</sup> This usually occurs after the health care employee has treated the patient and is disposing of the needle.<sup>67</sup> It is less likely that an assisted person would contract the disease from a public safety worker. Logically, the public safety employee would first have to puncture or cut himself or herself to transmit the disease to an assisted person. While the CDC acknowledges that some cases may go unreported, it is reasonably safe to conclude that the number of transmissions to health care and public safety workers establishes a benchmark for the outer limit of transmissions to patients and victims.<sup>68</sup>

The risk of contracting HIV from a health care or public safety employee is staggeringly small when one considers the number of employees in public safety and health care professions and the number of people they are assisting. The Department of Labor statistics indicate that there were 599,550 police officers<sup>69</sup>, 275,730 firefighters<sup>70</sup>, 170,690 paramedics<sup>71</sup>, and 8,972,730<sup>72</sup> healthcare workers (dentists, lab

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<sup>64</sup>Smith, *supra* note 62, at 743, citing Centers for Disease Control, *Update: Investigations of Persons Treated by HIV-Infected Health Care Workers*, 42 MORBIDITY & MORTALITY WKLY. REP. 329 (1993). (The report summarizes the preliminary findings of an investigation. The improper use of needles and syringes aiding in the transmission of HIV.)

<sup>65</sup>Ippolito, Puro, Heptonstall, Jagger, De Carli, & Petrosillo, *Occupational Human Immunodeficiency Virus Infection in Health Care Workers: Worldwide cases Through September 1997*, CID 1999; 28.

<sup>66</sup>*See id.* The CDC declared that the risk of HIV transmission to a health care worker from a patient after “percutaneous exposure to HIV infected blood is approximately 0.3 percent.” This standard has yet to be modified in any fashion. The CDC defines exposure prone procedures as the “digital palpation of a needle tip in a body cavity or simultaneous presence of a health care worker’s fingers and a needle or other sharp instrument in a poorly visualized or highly confined anatomic site.” 1 Health L. Prac. Guide § 10:11 (2002).

<sup>67</sup>*Id.*

<sup>68</sup>*Id.*

<sup>69</sup>U.S. Department of Labor, <http://www.bls.gov> (last visited Mar. 2003). The author will assume for purposes of analysis that there have been ninety-three transmissions to patients and victims during the twenty-year course of the epidemic (follow “Occupations, Occupational Employment Statistics, overview” follow “2002 National Industry Specific Occupational Employment & Wage Estimate.”)

<sup>70</sup>*Id.*

<sup>71</sup>*Id.*

<sup>72</sup>*Id.*

workers, physicians, nurses) working in the United States in 2001. To arrive at the risk to date, the number of reported transmissions (ninety-three) is divided by the number of possible transmissions that could occur between a professional and a person assisted. To obtain the potential number of transmissions, the total number of employees is multiplied by the number of average contacts the employee has with the general public each day. This figure is then multiplied by the number of days in a year (365), which is multiplied by twenty years.

To calculate the number of contacts an employee has with the public, a variety of sources were used. A report published by the Department of Justice stated that police officers have nearly 45 million face-to-face contacts with civilians in a year.<sup>73</sup> Using the number of contacts (45 million) and dividing that number of police (599,550) gives the approximate number of contacts per year per police officer as seventy-five. To estimate the number of contacts fire fighters and paramedics average in a day, a national fire survey was used.<sup>74</sup> An estimated number of fire and EMS calls made in the United States is approximately 8,453,854.<sup>75</sup> Using this number divided by the number of fire and EMS workers in the United States (446,420) calculates to an average of nineteen contacts per year per worker. D. Underwood is an ophthalmologist who conducted a case study that included the number of interaction between nine doctors and their patients. Using Dr. Underwood's study, an average of thirty-two patients per day are seen by each practitioner.<sup>76</sup>

Using these figures, the risk of a patient or victim contracting HIV in an encounter with a health care professional or public safety worker is estimated to be four out of every hundred billion contacts.<sup>77</sup> This estimate represents the outer limit of the risk that exists, because it represents the risk of transmitting HIV from a person assisted to a health care or public safety worker, which is greater than the risk of transmission from a worker to a person assisted. The actual risk may be much lower and may be 6/93rds of this figure (the ratio of the reported transmissions in

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<sup>73</sup>U.S. Department of Justice, Use of Force by Police, <http://www.ojp.usdoj.gov/bjs/abstract/ufbponld.htm> (last visited Mar. 2003).

<sup>74</sup>PETER MATTHEWS, PART I 2001 NATIONAL RUN SURVEY, JUNE 2002 (published by Firehouse).

<sup>75</sup>*Id.*

<sup>76</sup>Walter L. Underwood: FACMPE, Improving Doctor/Patient Productivity Through Patient-Volume Measurement, <http://www.ascrs.org/publications/ao/ae92underwood.html> (last visited March 2003).

<sup>77</sup>The calculation was done by taking the number of reported cases (93) and dividing that by the total number of contacts with patients and victims by health and public safety personell during the course of the epidemic. This total is estimated by adding the total of police (599,550) multiplied by the number of average contacts per year by worker (75); plus total number of firefighters (275,730) and EMS (170,690) multiplied by the number of average contacts per year by worker (19); plus total number of health care (health care practitioners and technical occupations 6,001,950 + 2,970,780 = 8,972,730) multiplied by the number of average contacts per day by worker (32). The total was then multiplied by days in a year (365) multiplied by the acknowledged number of years AIDS has been treated (20). The equation is  $93 / (899,325,000 + 169,077,080 + 2.096030E12) = .00000000004$  – representative of the risk of an occupational worker infecting a person that he assists.

each direction), or 2.6 transmissions out of every trillion contacts.<sup>78</sup> The risk of transmission is so vanishingly small, yet the courts have held that public safety and health care workers present a significant risk and should not practice in their occupations.<sup>79</sup>

An article published by the American Bar Association in 1988 addressed the pending issue of probability of transmission from health care worker to patient.<sup>80</sup> The article emphasized the low risk of HIV transmission in the relationship. The article argues that it would be unwise and unnecessary to restrict the job performance of health care workers because of the nominal risk.<sup>81</sup> Comparatively, the National Weather Service estimates the odds of being struck by lightning in the U.S. is one in 615,000.<sup>82</sup> Americans routinely are outside during electrical storms without worrying about being struck by lightening. Yet, there is a much higher likelihood of being struck by lightning than contracting HIV when being treated by a public safety or health care employee. Inherent risk exists in every human activity but at some point it becomes so slight that it is considered inconsequential.

### III. STATUTES

#### A. *Anti-Discrimination Legislation: Federal Rehabilitation Act of 1973 and Americans with Disabilities Act*

The question that is posed to the courts, is whether a public safety employee who is infected with HIV or AIDS poses a direct threat to others, which cannot be eliminated by reasonable accommodation. There are two statutory bodies of law that protect employees who are disabled from workplace discrimination. Public safety employees and healthcare workers fall under the protection of the statutes that are discussed below.

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<sup>78</sup>*Id.*

<sup>79</sup>The ratio above indicates the low risk that is present from public safety and healthcare employees to persons they are assisting. An article published by the American Bar Association in 1988 addressed the pending issue of probability of transmission from health care worker to patient. Eric N. Richardson & Salvatore J. Russo, *Calming AIDS Phobia: Legal Implications of the Low Risk of Transmitting HIV in the Health Care*, 28 U. MICH. J. L. REFORM 733 (1995). The article emphasized the low risk of HIV transmission in the relationship. The article argues that it would be unwise and unnecessary to restrict the job performance of health care workers because of the nominal risk. *Id.*

As of 2003, there had been only six reported cases worldwide where patients have been infected by a health care worker and no reported instances where a public safety worker infected a person assisted. *Id.* at 745. The medical evidence suggests that the risk of HIV being transmitted from public safety or health care worker to patient is extremely low. One study found that there was "no HIV transmission in 369 person hours of surgical exposure." *Id.* at 744. (citing Audrey S. Rogers et al., *Investigation of Potential HIV Transmission to the Patients of an HIV-Infected Surgeon*, 269 JAMA 1795, 1799 (1993).

<sup>80</sup>See Richardson & Russo, *supra* note 79, at 733.

<sup>81</sup>*Id.*

<sup>82</sup>David H. Levy, *When the Big Clouds Gather*, THE PLAIN DEALER, PARADE MAGAZINE 4, May 18, 2003.

The Federal Rehabilitation Act of 1973 (Rehabilitation Act)<sup>83</sup> protects HIV infected individuals from discrimination. Section 504 of The Rehabilitation Act protects “otherwise qualified” handicapped individuals (now “individuals with a disability”) from discrimination “under any program or activity receiving financial assistance.”<sup>84</sup> “Otherwise qualified” limits coverage by requiring that individual in question be able to perform the essential functions of the job. In 1974, the definition of an individual with a disability was expanded: “any person who (i) has a physical or mental impairment which substantially limits one or more of such a person’s major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.”<sup>85</sup> To be considered disabled under the Act, the individual must be substantially limited as to a major life activity.<sup>86</sup> Major life activities are functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, breathing, learning, and working.”<sup>87</sup>

In 1991, Congress passed the ADA, which expands the coverage offered under the Rehabilitation Act of 1973, prohibiting private employers that have fifteen or more employees from discriminating against the disabled.<sup>88</sup> The ADA parallels the Rehabilitation Act in that it uses much of the same language in the legislation. Under the ADA the definition of a disability is identical to the Rehabilitation Act. A disability is considered: a physical or mental impairment that substantially limits one or more life activities, or the disability has been of record, or the individual is perceived as being impaired.<sup>89</sup>

The ADA provides, “no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”<sup>90</sup>

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<sup>83</sup>29 U.S.C. § 794 (1973).

<sup>84</sup>*Id.*

<sup>85</sup>*Id.*

<sup>86</sup>*Id.*

<sup>87</sup>29 U.S.C. § 794 (1973).

<sup>88</sup>*See JASPER, supra* note 23, at 22.

<sup>89</sup>*Id.*

<sup>90</sup>42 U.S.C. § 12112(a). Mandatory HIV testing is lawful only if it can be shown that the employee poses a direct threat to himself or others. Because the only known way that a virus can be transmitted is by an exchange of bodily fluids then in most cases there is no need for mandatory HIV testing.

The American Disability Act (ADA) protects, qualified individuals with a disability from discrimination based on their disability 86(e). *The Right to Privacy and HIV Testing In the European Community and the United States*, 65 FORDHAM L. REV. 2775, 2800 (1997), *citing* 29 C.F.R. § 1630.2(g). This includes medical examinations and inquiries. After initial employment, the statute provides: “a covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such an employee is an individual with a disability or as to the nature and extent of the disability, unless such an examination is shown to be job related and consistent with business necessity.” *See Dickson, supra* note 36, at 138 *citing* 42 U.S.C. 12112(d)(2)(A). If a disabled person is unable to perform all the

Aside from the ADA expanding coverage to privately employed individuals, there are some additional differences between the Rehabilitation Act and the ADA. The Rehabilitation Act inquires as to whether there is a significant risk as an element of qualification. The ADA, in addition, inquires as to whether there is a direct threat to others that cannot be eliminated through reasonable accommodations.<sup>91</sup> Both of the statutes protect individuals that are otherwise qualified from discrimination in employment settings. Several circuits have interpreted the two to be synonymous.<sup>92</sup> The ADA expressly provides that “nothing [herein] shall be construed to apply to a lesser standard than . . . under . . . the Rehabilitation Act . . . or the regulations issued . . . pursuant to [it].”<sup>93</sup> Another difference is that the Rehabilitation Act includes a non-exhaustive list of major life activities that a disability may impair. Under the ADA, there is no inclusive or exclusive list. This enables the ADA to provide extensive coverage for individuals with disabilities. The 101st Congress stated that one of the objectives of passing the Act was to protect individuals with HIV.<sup>94</sup>

Administrative agencies, such as the Equal Employment Opportunity Commission (EEOC) and the Department of Justice (DOJ), view the ADA as covering all stages of HIV infection. The EEOC stated “. . . impairments such as HIV infection are inherently limiting.”<sup>95</sup> The DOJ explicitly includes HIV as a disability in its regulations. The question may arise whether an asymptomatic individual is considered disabled. If he is disabled then is he entitled to ADA protection? The DOJ notes that the phrase, “symptomatic or asymptomatic” was inserted in response to those that thought clarification was necessary.

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essential functions of the job, the court may consider whether any reasonable accommodation by the employer would allow the employee to perform his/her job functions satisfactorily. *See* Dickson, *supra* note 36, at 144.

<sup>91</sup>Adam G. Forrest, Note, *Is There a Significant Risk or High Probability of HIV Transmissions from an Infected Health Care Worker to Others? The Sixth Circuits Answer Lies in Mauro v. Borgess Medical Center*, 32 CREIGHTON L. REV 1763, 1768 (1999). Accommodation is not reasonable if it imposes “undue financial and administrative burdens,” or if it requires “a fundamental alteration in the nature of [the] program.” *Southeastern Community College v. Davis*, 442 U.S. 397, 410 (1979).

<sup>92</sup>*See* FORREST, *supra* note 91, at 1768.

<sup>93</sup>42 U.S.C. § 12201(a).

<sup>94</sup>DICKSON, *supra* note 38, at 139.

<sup>95</sup>*Id.* The Equal Employment Opportunity Commission (EEOC) publishes guidelines that are quite specific about what is permissible or impermissible to ask prospective employees. Some of the impermissible subjects to inquire about are: existing impairments, limitations on life activities, and singling out the individual to perform aspects of the job, but not singling out others. Some of the permissible subjects that an employer can ask a prospective employee is: can the employee perform the job, asking every applicant to demonstrate ability to perform, and asking about required certifications or licenses. *Id.* at 139, 91(b). Under the ADA, voluntary examinations are permitted which have been integrated into the employee health program. *See* Dickson, *supra* note 38, at 139, 91(c). A covered entity shall make inquiries into the ability of the employee to perform work related functions. *See* Dickson, *supra* note 38, at 139, 91(d). An employer may impose medical tests after hiring, but under the ADA they must be job related and consistent with business use. *Id.* at 140, 91.

The United States Supreme Court recently limited the ADA's coverage. In *Chevron USA Inc. v. Echazabal*,<sup>96</sup> the Court ruled that if hiring an individual would pose a direct threat to himself, an employer may refuse to hire the individual without violating the Americans with Disabilities Act.<sup>97</sup> Effectively, this means an employer not only has the defense that an employee may pose a threat to others, but also that the employee may pose a threat to himself.<sup>98</sup> The ADA and Rehabilitation Act offer protection to individuals who have disabilities but can perform the essential functions of a job.<sup>99</sup> Judicial interpretation of the requirements of these statutes has often left individuals with HIV without adequate protection.<sup>100</sup>

#### IV. TWO LEADING CASES

##### A. *Asymptomatic HIV as a Disability Under Bragdon v. Abbott*

In the 1998 landmark case, *Bragdon v. Abbott*, the Court raised several issues involving AIDS as a disability.<sup>101</sup> The first issue is whether a disability under the ADA includes asymptomatic HIV. The second issue is whether a health care professional can refuse treatment because of the direct threat the patient poses to the health and safety of others.

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<sup>96</sup>*Chevron U.S.A., Inc. v. Echazabal*, 122 S.Ct. 2045 (2002).

<sup>97</sup>*Id.* at 2050.

<sup>98</sup>This is an issue that will not be significantly addressed in this note.

<sup>99</sup>RANDY S. RABINOWITZ, OCCUPATIONAL SAFETY AND HEALTH LAW 2ND EDITION 900-908 (ABA Section of Labor and Employment Law 2002). In *Alabama v. Garrett* the Supreme Court addressed whether the ADA exceeded congressional authority provided under the U.S. Constitution to enforce the equal protection rights of individuals with disabilities. *Bd. of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001). It came to the conclusion that the ADA did not meet the level of congruence and proportionality necessary to overcome the Eleventh Amendment protection to the states. *Id.* The ADA now joins Violence Against Women and the Age Discrimination in Employment Act as laws deemed unconstitutional against the states.

<sup>100</sup>Another statute that provides protection to employees that are sick or are disabled is the Family and Medical Leave Act (FMLA). See Rabinowitz, *supra* note 99 at 91, 900-908. The FMLA gives employees with serious health conditions up to twelve weeks of unpaid leave with guaranteed reinstatement to the employees' position. *Id.* This gives qualifying individuals additional protection beyond the protection the ADA provides. *Id.* However, the employee must meet the criteria of FMLA to be a qualifying candidate. *Id.* The following are the main elements that must be met to qualify for FMLA protection. *Id.* The employers that are covered under the FMLA are all private employers that have fifty or more employees within a seventy-five mile radius and public sector employers without regard to their size. *Id.* The employee requesting the leave must have been employed for a minimum of twelve months. *Id.* The serious injury or illness must meet the FMLA definition of serious health condition this is typically defined as incapacity or continuing treatment by a health care provider. *Id.* He must be unable to perform one or more essential functions of his job to qualify for FMLA leave. *Id.* If it is practical the employee must give thirty days notice to the employer if the leave is foreseeable. *Id.*

<sup>101</sup>*Bragdon v. Abbott*, 524 U.S. 624 (1998).

In this case, Sidney Abbot went to the office of Dr. Randon Bragdon for a dentist appointment.<sup>102</sup> On the preliminary medical form, Abbot disclosed she was HIV positive.<sup>103</sup> After finding a cavity, Dr. Bragdon informed her that he could not fill the cavity in his office but would perform the procedure in the hospital *due to her HIV status*.<sup>104</sup> Abbott sued Bragdon under the ADA, pursuant to the applicable provision of the statute<sup>105</sup> that provides:

“No individual shall be discriminated against on the basis of disability in the full and equal employment of the goods, services, facilities, privileges, advantages, or accommodations of any person who operates a place of public accommodation.”<sup>106</sup>

The trial court granted summary judgment in favor of Abbot.<sup>107</sup> It held that an HIV positive person is afforded protection under the ADA.<sup>108</sup> The United States Court of Appeals for the First Circuit affirmed, restating the premise that the “Rehabilitation Act does not require the hiring of a person who posed a direct threat of communicating an infectious disease to others.”<sup>109</sup> The issue here was whether Bragdon could refuse treatment to Abbott based on the threat she posed.<sup>110</sup> Under ADA standards, Bragdon could refuse treatment only if Abbott’s disability “posed a direct threat to the health or safety of others.”<sup>111</sup>

The definition for direct threat under the ADA is “a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.”<sup>112</sup> The Supreme Court held that objective medical evidence along with the judgment of a health care professional should determine if a significant risk is present.<sup>113</sup> However, the Court did not cite sufficient material in the record that an HIV positive individual posed no direct threat to the health and safety of others.<sup>114</sup>

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<sup>102</sup>*Id.*

<sup>103</sup>*Id.*

<sup>104</sup>*Id.*

<sup>105</sup>42 U.S.C. § 12182(a).

<sup>106</sup>42 U.S.C. § 12112(a). A public accommodation includes “the professional office of a health care provider.” 42 U.S.C. § 12182(7)(F).

<sup>107</sup>*See Bragdon*, 524 U.S. at 629.

<sup>108</sup>*Id.*

<sup>109</sup>*Id.* at 626.

<sup>110</sup>*See Bragdon*, 524 U.S. at 624.

<sup>111</sup>42 U.S.C. § 12182(b)(3).

<sup>112</sup>42 U.S.C. § 12182.

<sup>113</sup>*See Bragdon*, 524 U.S. at 626.

<sup>114</sup>*Id.* at 630.

The Supreme Court first assessed whether the HIV infection was a disability under the ADA<sup>115</sup> and held that it was.<sup>116</sup> In answering this question the Court addressed three issues: (1) whether the HIV infection is a physical impairment;<sup>117</sup> (2) is the life activity that respondent relies upon considered a major life activity under the ADA;<sup>118</sup> and (3) whether the impairment substantially limits the major life activity.<sup>119</sup>

The Court conceded that every agency that has considered the issue of HIV infected persons that are covered under the ADA has found that they are protected.<sup>120</sup> In addition, every court that had been presented with the question if an asymptomatic HIV individual is covered under the ADA had answered in the positive.<sup>121</sup>

Plaintiff claimed that having HIV substantially limited a major life activity, namely pregnancy. The Court stated that, “[i]n light of the immediacy with which the virus begins to damage the infected persons white blood cells and the severity of the disease, we hold it is an impairment from the moment of infection.”<sup>122</sup> The Court concluded that becoming pregnant and giving birth were major life activities.<sup>123</sup> The Court stated that contrary to Bragdon’s contention that the ADA only covers public activities, the ADA covers private activities, such as caring for oneself.<sup>124</sup> Because of AIDS’ lethal outcome and significant possibility of transmitting the disease to her

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<sup>115</sup>See *Bragdon*, 524 U.S. at 625. “In light of the immediacy with which the virus begins to damage the infected persons white blood cells and the severity of the disease, we hold it is an impairment from the moment of infection. As noted earlier, infection with HIV causes immediate abnormalities in a person’s blood, and the infected person’s white cell count continues to drop throughout the course of the disease, even when the attack is concentrated on the lymph nodes. In light of these facts, HIV infection must be regarded as a physiological disorder with constant and detrimental effect on the infected hemic and lymphatic systems from the moment of infection. HIV infection satisfies the statutory and regulatory definition of a physical impairment during every stage of the disease.” *Id.* at 637.

<sup>116</sup>*Id.* at 625.

<sup>117</sup>*Id.*

<sup>118</sup>*Id.*

<sup>119</sup>*Id.* at 631.

<sup>120</sup>*Id.* at 642.

<sup>121</sup>*Id.* at 644.

<sup>122</sup>*Id.* at 637.

<sup>123</sup>See *Bragdon*, 524 U.S. at 643. “Our evaluation of the medical evidence leads us to conclude that respondent’s infection substantially limited her ability to reproduce in two independent ways. First, a women infected with HIV who tries to conceive a child imposes on the newborn a significant risk of becoming infected. The cumulative results of 13 studies collected in a 1994 textbook on AIDS indicates that 20% of male partners of a woman with HIV, become HIV-positive themselves . . .” (citing Osmond & Padian, *Sexual Transmission of HIV*, [in AIDS Knowledge Base 1.9-8, and tbl.2]).

“Second, an infected woman risks infecting her child during gestation and child birth, i.e. prenatal transmission. Petitioner concedes that women infected with HIV face about a 25% risk of transmitting the virus to their children.” *Bragdon*, 524 U.S. at 641.

<sup>124</sup>See *Bragdon*, 524 U.S. at 640.



husband (through sexual intercourse) and child (through conception), the Supreme Court held in favor of plaintiff.<sup>125</sup>

The Court also reviewed another issue asking if a private health care provider must perform invasive procedures on infectious patients in his office, and if courts should defer to the health care provider's professional judgment?<sup>126</sup> The Court considered substantial testimony from a number of health experts indicating that it is safe to treat patients infected with HIV in dental offices.<sup>127</sup> Bragdon asserted that the use of high-speed drills and surface cooling with water created a risk of airborne HIV transmission.<sup>128</sup> The Court concluded that the study on which Bragdon relied was inconclusive.<sup>129</sup>

The Court's holding demonstrates that respondent's HIV infection falls within the ADA's definition of disability. The Supreme Court remanded the case to the First Circuit so that Bragdon could produce evidence proving that Abbott posed a significant risk of transmitting HIV. On remand, the First Circuit held that a dentist's cavity filling procedure on a patient does not pose a direct threat to others.<sup>130</sup>

#### *B. Arline: The Four Prong Test*

In *School Board of Nassau County v. Arline*, the Supreme Court first determined that a person suffering from a contagious disease can be disabled within the meaning of section 504 of the Rehabilitation Act.<sup>131</sup> In that case a teacher was fired from her job because of her tuberculosis infection.<sup>132</sup> The termination occurred after her third relapse of tuberculosis within two years.<sup>133</sup> After she was denied relief in state administrative proceedings she brought suit in federal court claiming that her termination constituted a violation of section 504 of the Rehabilitation Act.<sup>134</sup>

The trial court found it "difficult to conceive that Congress intended contagious diseases to be included within the definition of a handicapped person."<sup>135</sup> The court held that even if a person with an infectious disease could be considered a handicapped person, Arline was not qualified to teach.<sup>136</sup>

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<sup>125</sup>*Id.* at 637.

<sup>126</sup>*Id.* at 647.

<sup>127</sup>*Id.* at 653.

<sup>128</sup>*Id.*

<sup>129</sup>*Id.*

<sup>130</sup>*Bragdon v. Abbott*, 163 F.3d 87 (1st Cir. 1998).

<sup>131</sup>*School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987), *superseded by statute*, Rehabilitation Act of 1973, PUB. L. NO. 109-173 (amended 1992), *as recognized in* *Shiring v. Runyon*, 90 F.3d 827 (3d Cir. 1996).

<sup>132</sup>*Id.* at 276.

<sup>133</sup>*Id.* at 276.

<sup>134</sup>*Id.*

<sup>135</sup>*Id.* at 277.

<sup>136</sup>*Id.*

The court of appeals reversed.<sup>137</sup> It held that “persons with contagious diseases are within the coverage of section 504.”<sup>138</sup> It also held that Arline fit neatly into the statutory and regulatory framework of the Act.<sup>139</sup> The court remanded the case to determine if the risks of infection precluded Arline from being otherwise qualified for the job and if it was possible to make reasonable accommodations for her.<sup>140</sup>

The Supreme Court granted certiorari. When determining if a particular individual is handicapped as defined by the Act it looked to the regulations published by the Department of Health and Human Services.<sup>141</sup> The Court discussed the legislative history of section 504 and the Court stated that “history demonstrates that Congress was as concerned about the effect on an impairment on others as it was about its effect on the individual.”<sup>142</sup> Using history and regulations, the Court held that allowing discrimination because a disease is contagious is inconsistent with the purpose of § 504.<sup>143</sup>

The remaining question was whether Arline was otherwise qualified for the job of an elementary school teacher. The Court stated that an individualized inquiry must be made in most cases<sup>144</sup> and set forth a four factor test that need to be considered when conducting an inquiry.<sup>145</sup> The four factors include the nature, duration, severity of the risk, and the probability that the disease will be transmitted.<sup>146</sup> In *Arline*, the Court held that a person with an infectious disease “who poses a significant risk of communicating an infectious disease is not otherwise qualified to perform his or her job.”<sup>147</sup> A risk assessment must also be made as to whether the employer could reasonably accommodate the employee.<sup>148</sup> In making the assessment one should defer to reasonable medical judgments of public health officials.<sup>149</sup>

### C. Controversial Phrases

Courts have applied the controversial statement in *Arline* that “a person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable

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<sup>137</sup>*Id.*

<sup>138</sup>*Id.*

<sup>139</sup>*Id.*

<sup>140</sup>*Arline*, 480 U.S. at 277.

<sup>141</sup>*See Arline*, 480 U.S. at 279.

<sup>142</sup>*Id.*

<sup>143</sup>*Id.* at 284.

<sup>144</sup>*Id.* at 287.

<sup>145</sup>*Id.* at 288.

<sup>146</sup>*Id.* at 287, 288.

<sup>147</sup>*See Arline*, 480 U.S. at 287, 288.

<sup>148</sup>*Id.* at 288.

<sup>149</sup>*Id.* at 274.

accommodation will not eliminate the risk”<sup>150</sup> in many different ways. The real question is what constitutes a significant risk. Significance is not controlled by seriousness of the harm because “significance” relates to probability which is determined by an individualized inquiry. From *Arline*, one can infer that the probability the risk will occur is the real meaning behind the phrase “significant risk.”<sup>151</sup>

Federal courts disagree about what the probability must be to be considered a significant risk. The Fourth, Fifth, and Sixth Circuits have followed a cautious rule. These courts have held that a theoretical possibility of transmitting AIDS is a sufficient showing of a “significant risk”. Their view is that, “when transmitting a disease inevitably causes death the evidence supports a finding of significant risk if it shows both a certain event can occur and that according to medical opinion that event can transmit the disease.”<sup>152</sup> This risk is not based on a medical opinion or evidence but instead on theory and fear.

Conversely, the First Circuit has construed the phrase “significant risk” to mean that there is more than a possibility of some danger.<sup>153</sup> In *Bragdon*, as discussed in the prior section, Dr. Bragdon refused services to an HIV infected individual. The Supreme Court affirmed summary judgment in favor of the HIV infected individual. The Court stated that “Dr. Bragdon is not entitled to absolute safety.”<sup>154</sup> The Supreme Court’s disposition on the issue of transmission of HIV is that there must be a significant risk for an individual not to be protected by the ADA or section 504 of the Rehabilitation Act. Several circuits and district courts that do not follow the Court’s reasoning.

#### V. CASE LAW UNSUPPORTIVE OF HIV INFECTED PUBLIC SAFETY AND HEALTHCARE WORKERS

##### A. Health Care

##### 1. *Mauro v. Borgess Medical Center*

Regardless of existing medical evidence, courts feed on the stigma surrounding AIDS. They are especially reluctant in healthcare cases to follow the guidance set forth under the Rehabilitation Act and the ADA. In *Estate of Mauro v. Borgess Medical Center*, the court failed to make a sound judicial analysis when a surgical technician was terminated from his position upon his employer discovering that he had AIDS.<sup>155</sup> Before terminating Mauro, Borgess organized a task force to determine if an HIV-positive employee could safely perform the job responsibilities of a surgical technician.<sup>156</sup> The committee determined that Mauro could not perform

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<sup>150</sup>*Id.* at 287.

<sup>151</sup>*Id.* at 273.

<sup>152</sup>*Onishea v. Hopper*, 171 F.3d 1289 (11th Cir. 1999).

<sup>153</sup>*Abbott v. Bragdon*, 107 F. 3d 934, 948 (1st Cir. 1997).

<sup>154</sup>*Id.*

<sup>155</sup>*Estate of William C. Mauro v. Borgess Med. Ctr.*, 137 F.3d 398 (6th Cir. 1998).

<sup>156</sup>*Id.* at 400.

the essential job functions of a surgical technician if HIV-positive. The district court granted Borgess' motion for summary judgment, relying on the four factors laid out in *Arline*.<sup>157</sup> On appeal, the Court of Appeals for the Sixth Circuit affirmed this holding that Mauro was not otherwise a qualified individual under the ADA.<sup>158</sup>

Judge Boggs vigorously dissented contending that a "significant risk" means, by process of elimination, a small risk that is not harmful.<sup>159</sup> The court failed to follow the Supreme Court's instruction to consider the probability of infection of contagious disease<sup>160</sup> and did not make an individualized inquiry as *Arline* requires. *Arline* specifically states that there must be a direct threat or significant risk for the employee not to be protected by the Rehabilitation Act.<sup>161</sup>

In addition, the Sixth Circuit did not take into account Mauro's expert witnesses, even though they were both physicians.<sup>162</sup> The majority held that a surgical technician may be required to participate in exposure-prone procedures. The court simply concluded that because some risk existed, Mauro was not qualified.

By contrast, Judge Boggs recognized that the ADA requires a legal assessment not "a sense of what we would prefer as an employer or patient."<sup>163</sup> He noted that the standard of significant risk means that employers may be required to expose their patients or others to some amount of risk. Judge Boggs stated, "in some way, Mauro poses some risk. It is not ontologically impossible for him to transmit a disease of very great lethality. However, the chance that he will do so to any given patient is 'small.'"<sup>164</sup> Judge Boggs pointed out that the court confuses exposure prone procedures with invasive procedures.<sup>165</sup> Mauro testified that, "usually if I had my hands near the wound, it would be to like, on an abdominal incision, to kind of put your finger in and hold – kind of pull down on the muscle tissue and . . . pull that back."<sup>166</sup> There was no testimony that Mauro ever performed any procedures that would be considered exposure prone. Under these circumstances, Judge Boggs concluded that it would be more appropriate for a jury to make the decision whether Mauro posed a significant risk of transmitting HIV to others.<sup>167</sup>

Unlike the court, Judge Boggs attempted to precisely address the significance of the risk. The CDC has estimated that, the risk to a single patient from an HIV-positive surgeon ranges from .0024% (1 in 42,000 procedures) to .00024% (1 in

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<sup>157</sup>*Id.* at 401.

<sup>158</sup>*Id.* at 402.

<sup>159</sup>*See Mauro*, 137 F.3d. at 408.

<sup>160</sup>*Id.* at 409.

<sup>161</sup>*Id.*

<sup>162</sup>*Id.*

<sup>163</sup>*Id.* at 407.

<sup>164</sup>*Id.* at 408.

<sup>165</sup>*Id.*

<sup>166</sup>*See Mauro*, 137 F.3d. at 406.

<sup>167</sup>*Id.* at 410.

417,000 procedures).”<sup>168</sup> Mauro was a surgical technician who only touched the wound marginally, if at all. Thus Mauro would pose a lower risk than a surgeon who only poses a risk ranging from .0024% to .00024%.<sup>169</sup> Judge Boggs pointed out that there is a degree of risk to almost every action.

[T]he perception of the significance of risk is subjective. More than a few people refuse to fly, though commercial airlines are said to be safe compared to other modes of transportation. There may be some people who refuse to cross streets. Others go bungee-jumping. So there is an inescapable normative component to the judgment of whether the chance that even a great peril will come to pass is “significant” or not.<sup>170</sup>

Is this considered significant under the ADA standards? There is no clear answer because the *Mauro* court did not define significant risk. Instead, the court reacted to fear and misguided apprehension.

The Sixth Circuit decided another related case as *Mauro* that same year, *EEOC v. Prevo’s Family Market Inc.*<sup>171</sup> The case concerned an HIV-positive individual, and while not in the public safety or healthcare sector, it illustrates the fear of the court. The EEOC represented Steven Sharp, a produce worker at Prevo’s Market.<sup>172</sup> Sharp had voluntarily disclosed that he was HIV positive.<sup>173</sup> Consequently, he was reassigned to the cash room.<sup>174</sup> Sharp was initially satisfied with the reassignment,<sup>175</sup> but shortly after reassignment, he complained of unwanted questions by fellow employees and no contact with customers.<sup>176</sup> He was granted paid leave and was requested to get a medical exam.<sup>177</sup> Sharp did not go to Prevo’s doctors, instead preferring to go to his own.<sup>178</sup> This was not satisfactory to Prevo’s Market,

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<sup>168</sup>*Id.* at 409, quoting *Doe v. University of Md.*, 50 F.3d 1261, 1263 (4th Cir. 1995).

<sup>169</sup>See Jennifer N. Coffin, “While not explicitly discussed in *Estate of Mauro*, one aspect of the CDC recommendations that may trouble courts is the reason given by the CDC for not recommending mandatory testing of health care workers. The CDC reports that “[currently] available data provide no basis for recommendations to restrict the practice of [health care workers] infected with HIV who perform invasive procedures not identified as exposure prone, provided the infected health care worker practice . . . universal precautions.” Quoting Centers of Disease Control & Prevention Civil Rights Rehabilitation Act of 1973 and Americans with Disabilities Act-HIV-Infected Health Care Workers and the “Direct Threat” Defense, 66 TENN. L. REV. 311, 326-327 (1998). *U.S. Dep’t of Health & Human Immunodeficiency Virus and Hepatitis B Virus to Patients During Exposure-Prone Invasive Procedures*, MORBIDITY & MORTALITY WKLY. REP., Jul. 12, 1991 at 1,4.

<sup>170</sup>See *Mauro*, 137 F.3d at 410.

<sup>171</sup>*EEOC v. Prevo Family Market, Inc.*, 135 F.3d 1089 (6th Cir. 1998).

<sup>172</sup>*Id.* at 1091.

<sup>173</sup>*Id.*

<sup>174</sup>*Id.*

<sup>175</sup>*Id.*

<sup>176</sup>*Id.*

<sup>177</sup>*EEOC*, 135 F.3d at 1091.

<sup>178</sup>*Id.*

and Sharp was dismissed from his position ten months later.<sup>179</sup> The court found that the job presented a grave enough risk that it was a necessity to require a medical examination mandated by the employer.<sup>180</sup> The court also held that it was lawful to reassign an employee without any objective evidence that the employee was a direct threat to others.<sup>181</sup>

The majority asserted that it was a business necessity that Sharp went for a medical examination. However, the ADA provides that a covered entity shall not require a medical examination unless it is shown to be job related and consistent with a business necessity.<sup>182</sup> According to the ADA, a recognized legitimate business practice is as follows: “1) when an employee is having difficulty performing his or her job effectively; 2) when an employee becomes disabled on the job or wishes to return to work after suffering an illness; 3) if an employee requests an accommodation; and 4) if medical examination, screening, and monitoring is required by other laws.”<sup>183</sup> Sharp’s situation did not fit any of the scenarios.

Judge Moore dissented and indicated the flaws in the majority’s opinion.<sup>184</sup> She analogized the majority’s opinion to treatment of black Americans in the 1940’s.<sup>185</sup> She stated that the majority’s opinion would only fuel unfounded fear, prejudice, ignorance, and myth.<sup>186</sup> Judge Moore also cited the CDC, asserting neither HIV nor AIDS has ever appeared on the list of infectious diseases that could be transmitted through the handling of food.<sup>187</sup>

The next major flaw in the majority’s opinion is that after the grocery store reassigned Sharp, it lawfully could not require a medical examination because it did not satisfy a business purpose.<sup>188</sup> The flaw with the majority’s opinion is that the very purpose of the ADA is to eliminate discrimination and exclusions that have no supporting evidence. The dissent also stated that the probability of Sharp infecting a fellow produce worker was one in ten million under normal circumstances.<sup>189</sup> If there is direct contact then the risk of transmission increases to one in forty thousand to one in four hundred thousand depending on the study.<sup>190</sup> From the statistical data, no direct threat exists. Even if there were, Sharp could still be a qualified worker if he could be reasonably accommodated. This could be accomplished by providing

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<sup>179</sup>*Id.* at 1092.

<sup>180</sup>*Id.* at 1097.

<sup>181</sup>*Id.*

<sup>182</sup>*Id.* at 1103.

<sup>183</sup>*Id.*

<sup>184</sup>*Id.* at 1098.

<sup>185</sup>*Id.* at 1099.

<sup>186</sup>*Id.*

<sup>187</sup>*Id.*

<sup>188</sup>*Id.* at 1101.

<sup>189</sup>*Id.*

<sup>190</sup>*Id.* at 1102.

Sharp his own knives and giving him gloves to wear.<sup>191</sup> The dissent pointed out that the majority singled out Sharp, but failed to acknowledge that using bloody knives is a risk for all blood borne pathogens.<sup>192</sup> Prevo's should have adopted universal safety procedures.<sup>193</sup> Moore's dissent condemned the majority opinion, "[in] that it allows employers to elevate fear over facts, ignorance over information, and mythology over medicine."<sup>194</sup>

## 2. *Bradley v. University of Texas M.D. Anderson Cancer Center*

In *Bradley v. University of Texas M.D. Anderson Cancer Center*,<sup>195</sup> the Court of Appeals for the Fifth Circuit similarly engaged in a conclusionary analysis that a small risk is a significant risk.<sup>196</sup> Bradley, also a surgical technician, was infected with the HIV virus. When his infection became known to the hospital, it reassigned him to assist in the purchasing department.<sup>197</sup> Bradley claimed that his reassignment violated the Rehabilitation Act of 1973. The district court granted summary judgment in favor of defendant and the Fifth Circuit affirmed.

The appellate court purported to follow *Arline*'s four-part test. The court referred to the guidelines provided by the CDC but failed to heed them. "The CDC states that 'the risk of transmitting HBV (Hepatitis B virus) from an infected HCW (Health Care Worker) to a patient is small, and the risk of transmitting HIV is likely to be even smaller.'"<sup>198</sup> The court admitted that the risk of transmission was minimal but it claimed that it is still significant.<sup>199</sup> The court was in agreement with the hospital that there was no reasonable accommodation that could be made for Bradley.<sup>200</sup> The hospital claimed that even Bradley's presence in the operating room posed too grave of a risk for the hospital and its patients.<sup>201</sup> The court concluded that Bradley's HIV-positive status gave the hospital grounds to reassign him.<sup>202</sup> The Fifth Circuit did not give deference to reasonable medical judgments of public health officers at the CDC.

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<sup>191</sup>*Id.*

<sup>192</sup>*Id.*

<sup>193</sup>*Id.*

<sup>194</sup>*Id.* at 1104.

<sup>195</sup>*Bradley v. University of Texas M.D. Anderson Cancer Center*, 3 F.3d 922 (5th Cir. 1993), *superseded by statute* Rehabilitation Act of 1973, 29 U.S.C §701 et seq., *as recognized in* Fedro v. Reno, 21 F.3d 1391 (7th Cir. 1994).

<sup>196</sup>*Id.*

<sup>197</sup>*Id.* at 923.

<sup>198</sup>*Id.* at 924.

<sup>199</sup>*Id.*

<sup>200</sup>*Id.* at 925.

<sup>201</sup>*Id.*

<sup>202</sup>*Id.*

### 3. *Doe v. University of Maryland Medical System Corporation*

*Doe v. University of Maryland Medical System Corporation*<sup>203</sup> involved a resident in neurosurgery who was infected with the HIV virus who filed suit against the University of Maryland for violating the Rehabilitation Act and ADA. Doe was stuck with an HIV contaminated needle while under the employment of the hospital.<sup>204</sup> He subsequently tested positive for the HIV virus.<sup>205</sup> The hospital, after learning of Doe's condition, consulted a panel of experts.<sup>206</sup> The panel suggested that Doe be able to continue in his position with the exception of not performing one procedure that included wire.<sup>207</sup> The hospital did not take the advice of its own panel, instead offering Doe alternative positions in non-surgical fields.<sup>208</sup> When Doe refused to accept another position the hospital terminated him.<sup>209</sup>

In the words of the district court, *Arline* factors "discount . . . the severity of anticipated harms by the statistical probability that they will occur."<sup>210</sup> Arguably, the court itself admitted that it did not follow a leading Supreme Court decision. The factors the court looked at were heavily based on emotion, not the law. In the Court of Appeals for the Fourth Circuit's opinion, the court stated "there may presently be no documented case of surgeon-to-patient transmission, [but] such a transmission clearly is possible."<sup>211</sup> The ADA and *Arline*, the two guiding bodies of law, do not define "significant risk" or a "direct threat" as just a possibility. As Doe argued the risk cannot be *so* infinitesimal and still be considered a significant risk.<sup>212</sup> The hospital admitted that the risk of transmission was small and quoted the CDC but would not follow CDC guidelines.<sup>213</sup> The CDC suggests that surgeons should be allowed to practice invasive procedures but that a hospital may bar HIV-positive surgeons from exposure prone procedures. The court's opinion cited to the possibility of a surgeon cutting himself with a sharp instrument and then bleeding directly into the patient's wound.<sup>214</sup> The court further declared that there was a possibility of transmission by Doe to a patient that constituted a grave enough risk.<sup>215</sup> The court held that the hospital was not in violation of the ADA or the Rehabilitation Act.

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<sup>203</sup>*Doe v. University of Maryland Medical System Corp.*, 50 F.3d 1261 (4th Cir. 1995).

<sup>204</sup>*Id.* at 1262.

<sup>205</sup>*Id.*

<sup>206</sup>*Id.*

<sup>207</sup>*Id.*

<sup>208</sup>*Id.*

<sup>209</sup>*Id.* at 1263.

<sup>210</sup>*Doe v. University of Maryland Medical Sys. Corp.*, C/A No. 92-2832 (D.Md. 1994).

<sup>211</sup>*University of Maryland*, 50 F.3d at 1266.

<sup>212</sup>*Id.*

<sup>213</sup>*Id.*

<sup>214</sup>*Id.* at 1263.

<sup>215</sup>*Id.* at 1266.



#### 4. *Waddell v. Valley Forge Dental Associates, Inc*

A recent decision in the Eleventh Circuit, *Waddell v. Valley Forge Dental Associates, Inc.*, concerned a dental hygienist who was HIV-positive and was terminated because he could not be reasonably accommodated in accordance with the ADA.<sup>216</sup> Valley Forge employed Spencer Waddell from early 1996 through October 1997.<sup>217</sup> In September of 1997, Waddell was tested to determine if he carried the HIV virus.<sup>218</sup> Waddell was notified shortly afterward that he did indeed test positive for the virus.<sup>219</sup> Valley Forge placed Waddell on paid leave while they determined what his future would be at Valley Forge.<sup>220</sup> After Valley Forge studied medical journals, it determined that Waddell posed a significant risk and he could no longer work as a dental hygienist.<sup>221</sup> Waddell was offered a clerical job at half the salary of dental hygienist.<sup>222</sup> He refused the position.<sup>223</sup>

Subsequently, Waddell brought suit and sought relief under the ADA and the Rehabilitation Act.<sup>224</sup> Both Waddell and Valley Forge filed for summary judgment.<sup>225</sup> Valley Forge admitted that Waddell's termination resulted solely from his status as being HIV positive.<sup>226</sup> The district court found that Waddell's job entailed "exposure prone" procedures.<sup>227</sup> The district court ruled in favor of Valley Forge's summary judgment. The court held that Waddell posed a direct threat to others following the standard set forth in *Onishea v. Hopper*.<sup>228</sup> *Onishea* elaborated the meaning of a "significant risk." The Court of Appeals for the Eleventh Circuit held that evidence supports a finding of significant risk if it shows that both a significant event can occur and that according to reliable medical opinions the event can transmit the disease.<sup>229</sup> The court noted that even if the probability of transmission is low, death itself makes the risk significant.<sup>230</sup>

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<sup>216</sup>*Waddell v. Valley Forge Dental Associates, Inc.*, 276 F.3d 1275 (11th Cir. 2001), *cert. denied*, 2002 U.S. LEXIS 3856 (2002).

<sup>217</sup>*Id.* at 1278.

<sup>218</sup>*Id.*

<sup>219</sup>*Id.*

<sup>220</sup>*Id.*

<sup>221</sup>*Id.*

<sup>222</sup>*Id.*

<sup>223</sup>*Id.*

<sup>224</sup>*Waddell*, 276 F.3d at 1278.

<sup>225</sup>*Id.*

<sup>226</sup>*Id.*

<sup>227</sup>*Id.*

<sup>228</sup>*Id.* at 1279. *See Onishea v. Hopper*, 171 F.3d 1289, 1299 (11th Cir. 1999)

<sup>229</sup>*See Onishea*, 171 F.3d at 1299.

<sup>230</sup>*See id.*

The *Waddell* appellate court held that the district court properly granted summary judgment to Valley Forge because Waddell posed a significant risk of HIV transmission.<sup>231</sup> The Eleventh Circuit reviewed the district court's decision. The district court had concentrated on the fourth factor in *Arline* – the probability of HIV transmission between a dental hygienist and a patient.<sup>232</sup> Reviewing several factors, such as the proximity of sharp objects and flesh, the appellate court determined that there was no reasonable accommodation that could be made for Waddell.<sup>233</sup>

The Eleventh Circuit, however, only discusses a theoretical possibility; it never considers the probability of an actual occurrence. The risk was admittedly small. Waddell's medical expert attested to the fact that the, "hygienist's fingers and dental instruments are rarely in the patient's mouth at the same time."<sup>234</sup> The court's opinion discusses the possibility of blood-to-blood contact between Waddell and a patient.<sup>235</sup> According to the law it has to be a significant possibility not just a "possibility."<sup>236</sup> The Eleventh Circuit, like many courts addressing the issue, purported to address the fourth factor of *Arline*, the probability of HIV transmission between a dental hygienist and patient. The court conceded that, "Waddell performed some procedures that entailed the use of sharp instruments, there was a risk that he could cut or prick himself and bleed into an open wound . . . ."<sup>237</sup> The court effectually holds that some risk constitutes a significant risk.

The Eleventh Circuit's decision conflicts with the preceding authority of *Bragdon* and *Arline*. In *Bragdon*, the Court held that courts should defer to agency interpretations.<sup>238</sup> The court in *Waddell* does not rely on medical experts in forming its opinion. Waddell presented two appellate court amicus briefs from the American Dental Association and the National Alliance of State and Territorial AIDS Directors in favor of his position. Additionally, the Infectious Diseases Society and American Dental Association of America (IDSA) filed briefs with the U.S. Supreme Court.<sup>239</sup> Each of these four briefs support Waddell's claim that he did not pose a significant risk of transmission when universal precautions were used.<sup>240</sup> IDSA and CSTE argue that, "such determinations by the 11th Circuit and other federal appeals courts are creating the incorrect presumption that defendants in the position of dental practice here can claim the 'direct threat' defense to an ADA suit against them until there is absolutely zero risk of disease transmission."<sup>241</sup>

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<sup>231</sup>See *Waddell*, 276 F.3d at 1275.

<sup>232</sup>*Id.* at 1282.

<sup>233</sup>See *id.*

<sup>234</sup>*Waddell*, 276 F.3d at 1275.

<sup>235</sup>*Id.* at 1281.

<sup>236</sup>See *Arline*, 107 S.Ct. at 287.

<sup>237</sup>See *Waddell*, 276 F.3d at 1282.

<sup>238</sup>See *Bragdon*, 524 U.S. at 642.

<sup>239</sup>*Waddell*, 276 F.3d at 1277.

<sup>240</sup>*Bragdon*, 524 U.S. at 642.

<sup>241</sup>Supreme Court Sustains Georgia Dental Hygienist's Direct Threat Status, *Andrews AIDS L. & Litig. Rep.*, (Univ. Pub. Group 2002).

Comparing *Waddell* to *Bragdon*, the results are not consistent. In *Bragdon*, the United States Supreme Court held that Abbott, the HIV infected person, was protected under the ADA. The instruments and general procedures which are involved in both cases are similar. Bragdon was filling a cavity and Waddell customarily cleaned teeth. The holding in *Waddell*, denying the healthcare provider protection under the ADA and Rehabilitation Act, is inconsistent with medical evidence and prior Supreme Court decisions. If the Eleventh Circuit had followed precedent, the district court's ruling would have been reversed.

### B. Fire

#### 1. *Anonymous Fireman v. City of Willoughby*

Mandatory testing for the HIV virus is an issue that is prevalent in employment. Its legitimacy depends on the probability of transmission, in the particular employment setting. A case that discusses this issue is *Anonymous Fireman v. City of Willoughby*.<sup>242</sup> Plaintiff, a fireman and paramedic, was transported without any prior notice to a lab that tested for HIV. He objected to the test but was told that it was mandatory. The district court addressed the issue if mandatory testing for HIV violated the Fourth Amendment of the United States Constitution.<sup>243</sup> The city argued that mandatory testing is proper because "AIDS is an epidemic and firefighters and paramedics are high-risk employees and are at risk to contract and or transmit the AIDS in their line of duty."<sup>244</sup> Plaintiff's position was that this non-consensual taking of blood is an unreasonable search and seizure under the Fourth Amendment.<sup>245</sup> The city responded that because the blood was drawn in an annual physical examination it did not violate the Fourth Amendment. Dr. Leonard Calabrese, an expert witness for the plaintiff, viewed the occupational risk for firefighters as well as health care providers to be low for transmitting or being infected by the HIV virus. Dr. Michael Lederman, another expert witness agreed.<sup>246</sup> The expert witnesses for the defendants stated that universal precautions are not practical and therefore HIV infected firefighters pose a significant risk to the public.<sup>247</sup>

The district court held that mandatory testing of firemen and paramedics for HIV was legal. The court agreed with defendant's expert witnesses that universal precautions were not practical. It held that there was no violation of the Fourth Amendment because not all searches are unreasonable. Testing firefighters infringed on minimal privacy interests and therefore was considered reasonable by this court. Finally, the court rationalized that because of the high-risk nature of the work that mandatory AIDS testing was legal.<sup>248</sup>

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<sup>242</sup> *Anonymous Fireman v. City of Willoughby*, 779 F. Supp. 402 (N.D. Ohio 1991).

<sup>243</sup> *Id.* at 405, 408, 415-418.

<sup>244</sup> *Id.* at 405.

<sup>245</sup> *Id.* at 406.

<sup>246</sup> *See id.* at 406.

<sup>247</sup> *See id.* at 407.

<sup>248</sup> *Id.* at 403.

From an objective stance, this does not seem logical. The district court does not realistically view the probability that a transmission would occur, only the harm that would occur if it did. Universal precautions must be in place according to the law. If universal precautions are not in place, logically then all public safety and health care workers themselves are at risk of being infected by a person that they assist. Firefighters and health care workers themselves need to be protected from blood born pathogens. The more significant effect that mandatory AIDS testing has is that it does not encourage the use of universal precautions. It feeds the stigma associated with AIDS in that it fosters the belief that HIV is transmitted by casual contact.

## VI. CASE LAW SUPPORTING HIV INFECTED PUBLIC SAFETY AND HEALTHCARE WORKERS

### A. Healthcare

#### 1. *John Doe v. Oregon Resorts*

A different scenario is a case where a man's wife was infected with the AIDS virus and he worked on the ski patrol. In *John Doe v. Oregon Resorts*,<sup>249</sup> the employer alleged that Doe posed a significant risk to others because of his risk of being HIV-positive. The risk was his association with his HIV infected wife and the possibility of him contracting the disease and then exposing others to the disease.<sup>250</sup> Oregon Resorts mandated that Doe be tested in order to keep his job as a ski patrolman.<sup>251</sup> The duties of ski patrol are to assist other medical personnel such as intermediate level EMTs and physicians on the mountain.<sup>252</sup> These duties may also include collecting needles when cleaning up an area.<sup>253</sup> Ski patrol, are not allowed to incubate, start IVs, perform injections,<sup>254</sup> or perform other invasive procedures.<sup>255</sup>

This case deals with discrimination by association. The district court held that the employer violated the ADA when it transferred ski patroller John Doe to another position.<sup>256</sup> The court followed *Arline*. The court emphasized analyzing the fourth prong of the test, probability of transmission.<sup>257</sup> Relying on expert witnesses, including Dr. Mark Loveless, the court found the risk to be insignificant.<sup>258</sup> Dr. Loveless noted the extensive studies conducted on HIV and its transmission.<sup>259</sup> To

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<sup>249</sup>John Doe v. Oregon Resort, 2001 U.S. Dist. LEXIS 17449. (D. Or. May 10, 2001).

<sup>250</sup>*Id.* at \*2.

<sup>251</sup>*Id.*

<sup>252</sup>*Id.*

<sup>253</sup>*Id.*

<sup>254</sup>*See* Oregon Resort, 2001 U.S. Dist. LEXIS 17449.

<sup>255</sup>*Id.*

<sup>256</sup>*Id.*

<sup>257</sup>*Id.* at \*18.

<sup>258</sup>*Id.*

<sup>259</sup>*See* Oregon Resort, 2001 U.S. Dist. LEXIS 17449 at \*19.

help illustrate the improbability of John Doe transmitting the disease through his ski patrol activities, the doctor noted, “[that] plaintiff’s risk of contracting HIV from his wife through a single sexual episode was low.”<sup>260</sup> Another expert witness, Dr. Chunn “acknowledged that even when health care providers are providing care involving deep body cavity work where the employer’s hands are not visible, studies have shown that transmission is rare.”<sup>261</sup>

Admittedly, this case differs from *Mauro* or *Doe v. Medical Corps.*, because Joe Doe position did not require him to use needles, administer IVs, or engage in invasive procedures. John Doe, however, still came into contact with bleeding wounds and faced extreme and dangerous conditions.<sup>262</sup> Nevertheless the district court followed the guidelines set forth in *Arline*, the ADA, and the Rehabilitation Act. The court deferred to the knowledge of doctors who have studied the risk of transmission of HIV.<sup>263</sup> The court also disclosed that there was a possibility of transmission, but that the possibility was so low that it [did] not constitute a “significant risk.”<sup>264</sup> In addition, if universal precautions are utilized the statistical risk becomes infinitesimal. Doe was entitled to reinstatement to his position as ski patrolman.<sup>265</sup>

## B. Fire

### 1. *Doe v. District of Columbia*

In *Doe v. District of Columbia*,<sup>266</sup> the court held that applicant John Doe established a prima facie case pursuant to the ADA. Doe applied for a position with the District of Columbia’s fire department as a firefighter.<sup>267</sup> Here, a physical exam was given, and if the applicant passed the exam he was acknowledged to be fully capable of performing the duties of a firefighter without risk to himself or others.<sup>268</sup> Doe passed the exam and was sent a letter of appointment.<sup>269</sup> The letter stated that Doe was on probationary status during his first year, and if there was any derogatory information found, he would be terminated.<sup>270</sup> Fearful that his HIV-positive status would be discovered, he called an official at the fire department and disclosed that he was infected with the disease.<sup>271</sup> He was told not to report for duty.<sup>272</sup> He was never

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<sup>260</sup>*Id.*

<sup>261</sup>*Id.* at \*20

<sup>262</sup>*Id.*

<sup>263</sup>*Id.* at \*21.

<sup>264</sup>*Id.*

<sup>265</sup>*Id.* at \*30.

<sup>266</sup>*Doe v. District of Columbia*, 796 F. Supp. 559 (D.D.C. 1992).

<sup>267</sup>*Id.* at 561.

<sup>268</sup>*Id.*

<sup>269</sup>*Id.* at 564.

<sup>270</sup>*Id.*

<sup>271</sup>*See District of Columbia*, 796 F. Supp. at 565.

told that the decision to hire him was rescinded nor was he told to come into work.<sup>273</sup> Doe thereafter sued the District under 42 U.S.C. § 1983<sup>274</sup> and the Rehabilitation Act.<sup>275</sup>

The district court held that the city violated the Rehabilitation Act.<sup>276</sup> The district court reassured that the firefighters wear protective gear when they are performing their job responsibilities.<sup>277</sup> The gear includes a helmet, hood, bunker coat, bunker pants, gloves, and bunker boots,<sup>278</sup> all of which are made of heavy, thick material. An expert witness, Dr. Parenti, Associate Professor of Medicine in the Division of Infectious Disease at George Washington University Medical Center in Washington, D.C., testified that an asymptomatic HIV-positive person has no impairment of his physical capabilities such as his strength, agility, or ability to breathe.<sup>279</sup> It is difficult to transfer the HIV virus. This is reflected by the low percentage of health care workers that have contracted the disease on the job.<sup>280</sup> According to Dr. Parenti “there is ‘no measurable’ risk that the disease will be transmitted through performance of fire fighting duties . . . .”<sup>281</sup> He equated the possibility of transmitting the disease while on the job with the probability of “getting struck by a meteor while walking down Constitution Avenue in Washington D.C.”<sup>282</sup> Katherine West, a certified nurse in the specialty of infection control at the Association for Practitioners in Infection Control, supports this finding.<sup>283</sup> She is employed at the George Washington University School of Medicine and Health Sciences in

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<sup>272</sup>*Id.*

<sup>273</sup>*Id.* at 566.

<sup>274</sup>“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.” 42 U.S.C. § 1983.

<sup>275</sup>*District of Columbia*, 796 F. Supp. at 561.

<sup>276</sup>*Id.* at 573.

<sup>277</sup>*Id.* at 561.

<sup>278</sup>*Id.* at 562.

<sup>279</sup>*Id.* at 561. Dr. David Parenti is an Associate Professor of Medicine in the Division of Infectious Disease at George Washington University Medical Center in Washington D.C. *Id.* He is also a member of the Infection Control Committee at the University. *Id.* He participates in devising and implementing institutional guidelines for HIV. *Id.*

<sup>280</sup>*Id.* at 563.

<sup>281</sup>*Id.*

<sup>282</sup>*See id.*

<sup>283</sup>*Id.*

Washington D.C..<sup>284</sup> She testified that all the protective gear that the firefighters utilize eliminates the risk of blood-to-blood contact. She is quoted as saying that the risk of HIV transmission is “so remote” and “extremely small.”<sup>285</sup> She also attested to the fact that several fire departments throughout the United States employ HIV-positive firefighters in active-duty status.<sup>286</sup> In addition there are no reported cases of HIV transmission during the course of fire fighting duties.<sup>287</sup> Both Dr. Parenti and Ms. West found that an HIV-infected person poses no measurable risk of transmitting the disease through the performance of fire fighting duties.<sup>288</sup>

The district court found Doe passed the physical examination and was able to do the job sufficiently before the city discovered that Doe was HIV-positive.<sup>289</sup> Doe’s HIV status did not impair his ability to perform his duties as a firefighter. The district court followed the guidelines of *Arline* and deferred to the experts.<sup>290</sup> It emphasized that the testimony was uncontested. The evidence supported the court’s finding that an HIV asymptomatic firefighter poses no measurable risk of transmitting the disease.<sup>291</sup> The defense failed to rebut Doe’s prima facie showing that he was discriminated against because of his HIV-positive status.<sup>292</sup> The court ordered that Doe be reinstated, that the city pay him back - pay with interest, and compensatory damages of \$25,000 and attorney fees and court costs.<sup>293</sup> The court gave a very strong statement about fostering fear and misguided apprehension.

“In the context of race the Supreme Court, has warned: The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly give them effect. ‘Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held.’”<sup>294</sup>

### C. Police

#### 1. *Holiday v. City of Chattanooga*

*Holiday v. City of Chattanooga*<sup>295</sup> involved a police officer who was denied employment with the city solely because he was HIV-positive. In 1993, Holiday

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<sup>284</sup>*Id.* at 564.

<sup>285</sup>*Id.*

<sup>286</sup>*Id.*

<sup>287</sup>*District of Columbia*, 796 F. Supp. at 564.

<sup>288</sup>*Id.*

<sup>289</sup>*Id.* at 566.

<sup>290</sup>*Id.* at 569.

<sup>291</sup>*Id.* at 563.

<sup>292</sup>*Id.* at 570.

<sup>293</sup>*Id.* at 573.

<sup>294</sup>*Id.* at 571 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

<sup>295</sup>*Holiday v. City of Chattanooga*, 206 F.3d 637 (6th Cir. 2000).

submitted an application to the City for employment in its police department. He subsequently took a written examination and completed a physical agility test.<sup>296</sup> He was invited for an interview and was granted a conditional offer of employment subject to a physical and psychological exam.<sup>297</sup> During the exam, Holiday voluntarily told the doctor that he had been diagnosed with HIV and that he was anemic.<sup>298</sup> The doctor told him that he passed the exam.<sup>299</sup> However, an employee from the doctor's called the police department and informed them that Holiday had failed the physical.<sup>300</sup> The doctor said Holiday was weak and unable to perform the work.<sup>301</sup> However, in actuality he was asymptomatic.<sup>302</sup> Louis Holiday brought suit against the City of Chattanooga under the ADA, charging that the city refused to hire him as a police officer because he was infected with HIV.<sup>303</sup>

The district court granted the city's motion for summary judgment.<sup>304</sup> It held that Holiday did not show that he was otherwise qualified to perform the essential functions of the job.<sup>305</sup> The Sixth Circuit reviewed the grant of summary judgment *de novo*.<sup>306</sup> The court of appeals found that the district court made no individualized inquiry regarding Holiday.<sup>307</sup> The ADA mandates an individualized inquiry in determining whether an employee's disability or other condition disqualifies him from a particular position.<sup>308</sup> There was no evidence that proved that Holiday could not perform the job properly.<sup>309</sup> He was asymptomatic at the time of his physical examination with Dr. Dowlen.<sup>310</sup> At the time of the examination, Dr. Dowlen made no assessments as to if Holiday was experiencing any fatigue, sluggishness, or shortness of breath.<sup>311</sup> The Sixth Circuit held that granting summary judgment was improper because there existed a genuine issue of material fact as to whether Holiday was otherwise qualified to perform the essential functions of a police officer. When Holiday inquired as to why he was not hired the city's office administrator told him

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<sup>296</sup>*Id.*

<sup>297</sup>*Id.*

<sup>298</sup>*See Holiday*, 206 F.3d at 641.

<sup>299</sup>*Id.*

<sup>300</sup>*Id.*

<sup>301</sup>*Id.*

<sup>302</sup>*Id.* at 644.

<sup>303</sup>*Holiday*, 206 F.3d at 640.

<sup>304</sup>*Id.* at 642.

<sup>305</sup>*Id.* at 643.

<sup>306</sup>*Id.* at 642.

<sup>307</sup>*Id.*

<sup>308</sup>*Holiday*, 206 F.3d at 643.

<sup>309</sup>*Id.*

<sup>310</sup>*Id.* at 644.

<sup>311</sup>*Id.*



that she could not, “put other employee’s at risk by hiring [him] . . . .”<sup>312</sup> This emphasizes the point that the job offer was contingent on Holiday’s HIV status. The city’s conclusion had no medical support. At the court of appeals, the city changed its position conceding that Holiday posed no threat to the health and safety of others.<sup>313</sup>

The Sixth Circuit reversed the district court’s grant of summary judgment.<sup>314</sup> The Sixth Circuit held that Holiday was entitled to be evaluated on his abilities and relevant medical evidence rather than on “fear, ignorance, or misconceptions.”<sup>315</sup> They also found that Holiday adduced sufficient evidence from which a jury could conclude that the city refused to hire him because he was HIV-positive.<sup>316</sup>

Comparatively, the Sixth Circuit did not make the same type of review and analysis in *Mauro v. Borgess Medical Center* as they did in *Holiday*. Both Mauro and Holiday argued that their respective district courts erred in concluding that there was no genuine issue of material fact.<sup>317</sup> In *Holiday*, the court went through a systematic analysis of the four factors in *Arline* and whether the City had made an individualized inquiry. The court concluded that a genuine issue of material fact did exist. It discussed that the opinion of one doctor was not sufficient for the City or the district court to conclude that Holiday was not qualified for a position as a police officer. In the opinion the Sixth Circuit stated, “courts need not defer to an individual’s doctor’s opinion that is neither based on the individualized inquiry mandated by the ADA nor supported by objective scientific medical evidence.”<sup>318</sup>

In addition, the court discussed the objective evidence. First Holiday was asymptomatic and showed no physical signs of the infection; indeed he was in good physical condition. The court examined what a typical police officer may encounter on the job. The judges stated that the use of force, wrestling, and striking suspects may result in injury to both the police officer and the suspect, but the court concluded that in light of the objective medical evidence, the risk of transmitting HIV was so low that it is not significant. Under the ADA the risk must be significant for an individual not to be protected.

The Sixth Circuit in *Mauro*, two years prior to *Holiday*, did not make this individualized analysis. Mauro argued that the probability of transmission was so slight that it did not constitute a significant risk. Mauro presented the evidence of CDC recommendations regarding HIV employees that states the risk from healthcare worker to patient is very small.<sup>319</sup> The court viewed the report as not complete. The report differentiated between exposure prone and invasive procedures. To perform exposure prone procedures strict guidelines should be followed and an expert panel

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<sup>312</sup>*Id.* at 647.

<sup>313</sup>*Id.*

<sup>314</sup>*Id.* at 648.

<sup>315</sup>*Holiday*, 206 F.3d at 648.

<sup>316</sup>*Id.* at 648.

<sup>317</sup>*Id.* at 640; *see also Mauro*, 137 F.3d at 401.

<sup>318</sup>*Holiday*, 206 F.3d at 645.

<sup>319</sup>*See Mauro*, 137 F.3d at 403.

should advise. For an invasive procedure the universal precautions are sufficient. Mauro usually did not even assist in surgery. His job duties mainly included giving the necessary surgical instrument(s) to the doctor during surgery.<sup>320</sup> The court rejected Mauro's argument on the ground that because some risk existed Mauro posed a direct threat to the safety of others.

In both cases some risk existed. In *Holiday* it was a police officer that might get injured during a pursuit of a suspect. In *Mauro* it was a surgical technician that on rare occasion assisted a surgeon for a brief moment. Arguably, on a daily basis Holiday had more direct contact with open wounds than Mauro because job duties of a police officer include wrestling and striking to subdue suspects.<sup>321</sup> Mauro infrequently assisted with surgeries. Therefore Holiday probably posed a greater risk than Mauro to the safety of others. However, the Sixth Circuit did not rule or analyze the cases similarly. This is consistent with the impression that the court's reasoning is based not on logic but on fear.

## 2. *Doe v. Chicago*

The district court in *Doe v. Chicago*<sup>322</sup> reviewed a motion to dismiss a claim alleging violation of Section 504 of the Rehabilitation Act, the Fourteenth Amendment, and the Illinois AIDS Confidentiality Act.<sup>323</sup> John and Jane applied for positions as police officers.<sup>324</sup> Both applicants passed the written and psychological examinations.<sup>325</sup> The City of Chicago Police Department tested Joe and Jane Doe for HIV without their consent.<sup>326</sup> Additionally, their applications for jobs as police officers were rejected solely because they were HIV positive.<sup>327</sup> John Doe received a conditional offer of employment, prior to the physical fitness examination conducted by Dr. Bransfield.<sup>328</sup> Jane Doe did not receive an offer.<sup>329</sup> Neither plaintiff gave consent to the HIV test, nor were provided counseling prior to the testing.<sup>330</sup> Afterward both plaintiffs were notified that they were HIV positive and they were not provided with any counseling.<sup>331</sup> The plaintiffs alleged that the defendants maintained a "custom, practice, or policy" of: "1) testing candidates for HIV as a condition of employment without medical justification; 2) requiring a physical examination prior to proving candidates with a valid conditional offer of

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<sup>320</sup>*Id.*

<sup>321</sup>*See Holiday*, 206 F.3d. at 647.

<sup>322</sup>*Doe v. Chicago*, 883 F. Supp. 1126 (N.D. 1994).

<sup>323</sup>*Id.* at 1132.

<sup>324</sup>*Id.*

<sup>325</sup>*Id.* at 1136.

<sup>326</sup>*Id.* at 1132.

<sup>327</sup>*Id.* at 1137.

<sup>328</sup>*Chicago*, 883 F. Supp. at 1132.

<sup>329</sup>*Id.*

<sup>330</sup>*Chicago*, 883 F. Supp at 1132.

<sup>331</sup>*Id.*

employment; 3) failing to obtain consent or provide counseling with regard to HIV tests; and 4) refusing to hire candidates solely because of their HIV-positive status.”<sup>332</sup> The city moved to dismiss the complaint arguing that the plaintiffs failed to state a claim upon which relief could be granted.<sup>333</sup>

The district court analyzed the testing provision of Section 504 of the Rehabilitation Act. Plaintiffs alleged that the city used the result of the medical tests to discriminate against them. The court found that discriminatory use of medical testing is specifically prohibited under Section 504.<sup>334</sup> The court held that the city was not testing in order to determine an applicant’s ability to perform the job.<sup>335</sup> The court stated that the “defendants acted knowingly and intentionally . . . and with reckless and callous indifference to plaintiffs’ rights.”<sup>336</sup> The court ruled that the city’s attempt to dismiss plaintiffs’ Section 504 claims of the Rehabilitation Act was moot.<sup>337</sup>

## VII. CONCLUSION

People in the United States need to gain control of the unfounded but prevalent fear of casual contact with HIV. It has been twenty years since AIDS was first mentioned. The treatment surrounding the disease is similar to the treatment of those that supported communism in the 1950s. Early in the 1950’s in the era of McCarthyism, artists were blacklisted and many others lost employment because of an incredible fear of communism. One of the earliest cases was *Dennis v. United States*.<sup>338</sup> The defendants, were supporters and advocates of communism, convicted for conspiring to overthrow the government.<sup>339</sup> In *Dennis* those that were on trial were convicted on the basis of a modified version of the clear and present danger formula.<sup>340</sup> The test was, if the gravity of the evil discounted by its improbability justifies an invasion of free speech it is necessary to avoid the danger. In *Dennis*, people were convicted on the premise that they believed in an idea. In light of the enormity of the evil apprehended, overthrowing the U.S. government, the Court was focused simply upon the possibility, not the probability of its occurrence. It was not until 1957, when the convictions of fourteen “second string” communist leaders reached the Supreme Court in *Yates v. U.S.*,<sup>341</sup> that McCarthy had died, and so had McCarthyism. Strong anticommunist sentiment persisted but the analysis of the risk was construed differently. In *Yates*, Justice Harlan, writing for the Court, acquitted

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<sup>332</sup>*Id.*

<sup>333</sup>*Id.* at 1138.

<sup>334</sup>*Chicago*, 883 F. Supp at 1135.

<sup>335</sup>*Id.* at 1135.

<sup>336</sup>*Id.* at 1139.

<sup>337</sup>*Id.* at 1144.

<sup>338</sup>*Dennis v. United States*, 341 U.S. 494 (1951).

<sup>339</sup>*Id.*

<sup>340</sup>*Schenk v. United States*, 249 U.S. 47 (1919).

<sup>341</sup>*Yates v. United States*, 354 U.S. 298 (1957), *overruled by* *Burks v. United States*, 437 U.S. (1978).

the five defendants and remanded to the lower court for proceedings against the other defendants.<sup>342</sup> The Court distinguished advocacy of forcible overthrow as an abstract idea from advocacy of action. Punishment is not justified for simply advocating the overthrow of the government but must include specifically promoting obstruction of the government. After McCarthyism ended, people were prosecuted if they had the intent to do harm. The assessment of risk differs in the latter case because there is more of an emphasis on the likelihood of the harm occurring rather than just the idea of it happening.

The similarity between the strong anti-communist movement and the treatment of those HIV-positive is that both are supported by fear instead of rational and logic. Akin to this is the treatment of AIDS. Millions of dollars have been dedicated for research on the disease. A number of studies and the leading government agency, the CDC, all have supported the continuation of public safety and healthcare workers in their professions. The courts have not adhered to the medical evidence or CDC guidelines when determining cases.

The assessment of risk is the disparity between the cases that support HIV individuals keeping their jobs and those cases that do not. Courts vary on how closely they examine the objective evidence that is presented to them. There is also a large discrepancy as to what is considered a “significant risk”. The courts that are supportive of a healthcare or public safety employee continuing in his position follow the guidelines set forth by the Rehabilitation Act and ADA. They carefully scrutinize the possibility of transmission. These courts typically do not adhere to the misperception and fear surrounding HIV/AIDS. Courts have difficulty in dealing with assessment of risk where there is an ultimate risk involved. Now, twenty years into the epidemic, the risk is four persons assisted out of every hundred billion contacts. As Judge Boggs’ dissent in *Mauro* emphasized, the assessment of risk is subjective.<sup>343</sup> There are people that go bungee jumping and then there are others that refuse to fly. The chance of being struck by lightning is much higher than the probability of contracting HIV from a public safety or healthcare provider. Society goes about its business during electrical storms, but despite the much lower risk, many courts have not permitted HIV positive health care and safety workers to continue in their occupations. There is a degree of risk to every human behavior. The issue is does an infinitesimal risk justify a growing population of HIV positive persons being cast out of occupations. The “[f]ear of harm ought to be proportional not merely to the gravity of the harm, but also to the probability of the event.”<sup>344</sup>

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<sup>342</sup>*Yates*, 354 U.S. at 338.

<sup>343</sup>*See Mauro*, 137 F.3d at 409.

<sup>344</sup>Antoine Arnaud et al., *La Loique, Ou L’Art De Penser* (1682—1668), in *THE EMERGENCE OF PROBABILITY: A PHILOSOPHICAL STUDY OF EARLY IDEAS ABOUT PROBABILITY, INDUCTION, AND STATISTICAL INFERENCE* 77 (Ian Hacking 1975), *quoted in*, *AGAINST THE GODS: THE REMARKABLE STORY OF RISK* 71 (Peter L. Bernstein 1996).